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In the

Supreme Court of the United States

OCTOBER TERM, 1984

KATHY JOHNSON,

Petitioner,

v.

THE PENNSYLVANIA STATE UNIVERSITY, BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY, JOHN W. OSWALD, individually and as President of the Pennsylvania State University, M. LEE UPCRAFT, individually and as Director of Residential Life Programs of the Pennsylvania State University,

Respondents.

On a Petition for a Writ of Certiorari
to the
United States Court of Appeals
for the Third Circuit

MOTION OF THE STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK, INC. AND COMMONWEALTH ASSOCIATION OF STUDENTS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 42 of the Rules of this Court, The Student Association of the State University of New York, Inc. (SASU) and Commonwealth Association of Students (CAS) respectfully move for leave to file the accompanying brief as amici curiae. Petitioners have consented to the filing of this brief: respondents have not.

INTEREST OF SASU AND CAS

SASU is a student run organization in the State of New York representing all full-time students attending the State University of New York higher educational system. In addition, the organization represents a substantial number of the students attending the community college system within the State University of New York. Total students represented are in the amount of approximately 50,000.

The organization was formed in 1972 and is designed to represent the interests of students attending the State University system through political, legislative and legal means.

The Commonwealth Association of Students (CAS) was formed in 1973 and represents the approximately 76,000 students attending the state colleges and universities in Pennsylvania. CAS is dedicated to serving the special political, social and economic interests of the students it represents. Organized, formed and controlled solely by students, CAS seeks to assure the individual rights of students as full and equal adult citizens and promote conditions conducive to academic freedom.

SASU and CAS in the instant case believe that the precedent set down by the Court of Appeals is incorrect as to the student's right to control access to his/her dormitory room and raises significant issues relative to student rights, both in Pennsylvania and the State of New York. It is believed by these student groups that Pennsylvania State University enforcement of the commercial regulations which preclude students from gathering together in the privacy of an individual student's dormitory room interferes with the student's First Amendment and Fourth Amendment rights and does not interfere with the privacy of non-participating students nor does it disrupt the study atmosphere of the residence hall. It is the organizations' belief that these regulations are unconstitutional and illegal and must, therefore, be striken.

Both organizations have substantial interests in the maintenance of a free atmosphere within the respective university systems and believes that the regulations not only restrict the freedom of speech of the students but are designed for the purpose of insuring the administration's control over the student

dormitory existence.

SASU and CAS, therefore, move for leave to file the accompanying brief as amici curiae.

Respectfully submitted,

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BRIEF OF THE STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK, INC. AND COMMONWEALTH ASSOCIATION OF STUDENTS AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 36 of the Rules of this Court, The Student Association of the State University of New York, Inc. (SASU) and Commonwealth Association of Students (CAS) respectfully submit this brief as amici curiae in support of the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

INTRODUCTION

The issue presented is whether students attending Pennsylvania State University have the right to invite persons of their choice into their dormitory rooms or whether the university has the right to control access of invited guests, based on the content of the speech and the nature of the invited guest.

This case is for declaratory and injunctive relief on behalf of students attending Pennsylvania State University.

This case, presents an issue of whether Pennsylvania State University can control a student's dormitory room as well as to regulate the guests and the content of their speech. It poses a question not of solicitation but rather of whether a student dormitory room for the purpose of First Amendment rights is equivalent of a non-student's home.

The Court of Appeals focused on AFS in its analysis and indicated that for the purposes of construing the students claims a speech made by AFS is and remains commercial and the student's acquire no different or greater rights by virtue of the fact that they invite the AFS representative to the privacy of their own dormitory room.

The Panel concluded that as a matter of law the speech was to be judged by the *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980) standard and that the outright ban on commercial speech by Pennsylvania State University was acceptable.

The decision below rejects the doctrine established in *Stanley v. Georgia*, 394 U.S. 557 in that it allows the university to control the content and nature of speech within an individual's dormitory room. Evidently, considering that a student's dormitory room is not the equivalent of the residency of a person who are not students, the effect of this decision is to retrogress to a time when the university was in loco parentis to students and to abrogate the most basic of student rights; the right to be secure within their own home from outside intrusion.

INTEREST OF THE AMICI CURIAE

The interests of SASU and CAS in this matter are set forth in the accompanying motion for Leave to File Brief as Amici Curiae.

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A. COMMERCIAL SPEECH IS PROTECTED TO THE LISTENER IN HIS/HER DORMITORY ROOM

The Court of Appeals for the Third Circuit rejects the idea that the student's right to control their own living space gives rise to a pure First Amendment issue. Rather the Court states that since AFS and the invited speech are of a commercial character the *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U. S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) test for commercial speech must govern. *AFS v. Penn State University*, 752 F.2d 854, 862 (1982)

The Court states that if the speech is commercial for the purposes of the giver, it cannot give rise to pure free speech and association rights of the listener[1] *AFS v. Penn State University*, supra. We disagree.

It is the position of the student groups urging reception of the petition that it is immaterial that the speech in this instance is commercial. What is material and what should govern this case is the location of the speech and the student's right to control that location and to receive the speech in the privacy of that location[2]

The Court of Appeal's focused on AFS and the commercial speech rather than on the issue of the locality of the speech and the student's rights within the dormitory room which should be the true nexus of the analysis.

If a student's dormitory room is akin to the student's home, then, like *Stanley v. Georgia*, speech is protected because of the location of the speech. While the Court of Appeals may be correct, and we do not concede this point, that speech once commercial stays commercial that did not address the issue before the Court - the the plaintiff's right to receive that speech, regardless of its character, within the privacy of her dormitory room: ". . . .free, except in very limited circumstances, from unwanted governmental intrusions into ones privacy". *Stanley v. Georgia, supra at 549*

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[1] *American Future Systems, Inc. v. Pennsylvania State University*, 752 F2d 854, 863 (1984)

[2] *AFS III*, 553 F. Supp. at 1282; *Piazzpola v. Watkins*, 442 F.2d 284, 289-90 (5th Cir. 1971); *Commonwealth v. McClosky*, 217 PA. Super. Ct. 432, 272 AD2d 271 (1970)

B. THE CHARACTER OF THE DORMITORY/STUDENT RELATIONSHIP

The student has First Amendment, Fourth Amendment and privacy rights in his/her dormitory room and does not give them up because he/she is a student. *Stanley v. Georgia*, 394 U.S. 557, 565, 22 L. Ed.2d 542, 549 (1969); *Griswold v. Connecticut*, 381 U.S. 471, 482, 14 L. Ed.2d 510, 513, 85 S. Ct. 1678 (1965)

In the university student relationship the traditional concepts of an individual's constitutional rights have been modified in recognition of the special role that education plays in the maturation process. *Moore v. Student Affairs Committee of Troy State University*, 284 F. Supp. 725, 729 (1968) This dimunition of students rights has been held to be in furtherance of the university's need to function as an educational institution. *Moore v. Student Affairs Committee of Troy State University* 284 F. Supp. at 730.

An educational institution such as a university has traditionally been thought of as a place for the free exchange of concepts, ideas and where communication can be had. The issue is whether the university, after requiring a student to reside in a dormitory as a condition of enrollment, can censor the student's access to outside information, communication, and can limit group discourse within the only space the student has — his/her dormitory room.

The Court below perceived the issue to be one revolving around American Future Systems, Inc. efforts to sell wares to students and was so offended by AFS that it ignored the actual issue being presented to that Court for review by the student plaintiff, not AFS.[3]

The student groups urge the Court to try to understand what it is like to live in a dormitory. Most students are compelled

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[3]The fact that the perception of the issues by the Court were influenced by a previous enforcement case heard by the Court of Appeals between the United States and AFS is demonstrated from the opening and permeates. Note the analysis of the Court relies on evidence not within the record of this case, but previously heard in the enforcement action. *U.S. v. AFS, Inc.*, 571 F. Supp. 551 (1983); aff'd 743 F2d 169 (Third Cir. 1984) Note footnotes 9 and 32 as well as the concurring opinion of Judge Sarokin.

to live in dormitories as a condition of obtaining a higher education. If a university, under the guise of controlling "disruption" has the right within student's dormitory rooms to censor speech that occupants engage in, control access to speakers and communication, limit the mode of give and take communication, then the student dormitory resident's right to higher education is more a right to limited access to information of the university's choice. Disruption, the justification for this policy used by Pennsylvania State University is not danger or disorder, it is loss of control and leverage over students by the administration.

The Court of Appeals in allowing itself to be carried away by the alleged reputation of AFS without considering the rights of the students placed itself in a position of condoning the university's prior restraint of the speakers and the content of the communication within the privacy of ones residence.

The issue is not whether a commercial enterprise has the right to visit the students, but the university's right to censor information, access to the information, and form of the information that the student *wishes* to receive in his/her dormitory room.[4]

It is clear that the Courts over time had been reluctant to intercede in affairs of educational institutions. T. Ross, *The University: The Anatomy Academe* 4 (1976) Only relatively recently, did the Courts, and to some extent, the Legislature, step in. *Burkins Developmental Law - Academic Freedman*, 81 Harvard Law Review 1045, 1148-52 (1968) This judicial intervention in support of academic freedom and student rights was to some extent based on the inevitable outcome of the enlargement of the public educational system where a college degree obtained an intrinsic economic value. *E. Hartford, Education in These United States*, 114-21 (1964)

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[4]Note in footnotes 3 and 30 the Court indicates that the university has the right to control activities within the dormitory room analogizing the university's right to do the same to a municipality's right to enact a zoning ordinance. This, of course, totally misfocuses the issue as a municipality's right to control zoning is not related to the activities that take place within the home.

In accordance with the development away from in loco parentis, Courts have indicated students are presumed to have sufficient maturity to handle their own personal affairs without intrusion by the university *Gunston v. Mills College of Oakland*, 41-1661 (Cal. Sup. April, 1971) cited in *M. Chambers, the College and the Courts* 106 (1972) as long as the dormitory is maintained as a environment consistent with the educational process, *Moore v. Student Affairs Committee of Troy University*, supra at 730. Recent cases in the absence of in loco parentis have moved more towards a landlord-tenant relationship explaining the dormitory/student residents life.[5]

Penn State University seeks to return students to the age of in loco parentis. Recent cases have recognized the dormitory room should be the bastian of the student, not the university, and that limitations placed on the student may only be acceptable if the student has a right to exercise his/her First Amendment rights within that bastian. *Harrell v. Southern Illinois University*, 457 N.E.2d 971, 978, (Ill. App. 5th Dist. 1983); *Chapman v. Thomas*, 743 F.2d 1056, 1059-1060 (1984)

The university, absent evidence of illegal or dangerous activity, should have no more right to control the association of people in student dormitory rooms than a landlord has over a tenant.

It is the content of the speech that is seeking to be regulated not the behavior of the students or the invited visitors. It is the students rights that are being violated not that of the invited vistor. These rights are being violated not for any tenable or

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[5]The courts receiving the landlord-tenant theory have attempted to differentiate the role of the educational institution as a landlord verses educational institution as to whether the university is performing a proprietary function, such as the supplying of living space. If a proprietary function is found, the courts have generally indicated that the university is a landlord. These analyses have basically been for the purpose of determining tort liability. *Preston v. State of New York*,. 59 NY2d 997, 998; *Bass v. City of New York*. 38 AD2d 407, 411 aff'd 32 NY2d 894; *Miller v. State of New York*. NY2d (1984) *Piazzola v. Watkins*. 442 F2d 284 (1971); *Commonwealth v. McClosky*. 217 PA. Super. Ct. 432, 272 AD2d 271 (1970)

justifiable reason[6] but rather because the university is seeking to keep the students at Penn State University in loco parentis to the university.[7] The university is seeking to ignore years of evolution in the relationship between institutions of higher learning and students.

One can imagine the consequences of allowing these regulations to continue. Implicit in the very regulation is the right of the university to review all speech to be made in the privacy of each student's room in order to determine whether it is of a acceptable nature by the university's own definition.[8] The student therefore is compelled to check with the university concerning his/her invited guests *and* the content of their communication prior to the invited visitation. Additionally, the university obstensively has the right to enter the student's dormitory room to verify and control the content of this communication and to verify that it is not of a "commercial" nature. (or perhaps obscene - note footnote 8)[9]

It is a basic right contained in our Constitution not to have this intrusion regardless of status as a student or place of residency - dormitory room or apartment.

> "They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations, they conferred, as against the government, the right to be left alone - the most comprehensive of rights and the right most valued by civilized man." *Olmstead v. United States*, 277 U.S. 438 (1928); Brandeis J., dissenting)

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[6]The Court of Appeals indicates that this is an inherent zoning like power (footnote 3) The opinion does not speak to any actual threat or complaint from the students.

[7]One might assume according to the "zoning" analysis utilized by the Court (footnote 3) that the university would also have the right to limit or exclude access to obscene material despite *Stanley v. Georgia*, 394 U.S. 557 (1969)

[8]The court addresses this (footnote 26) where it indicates that analysis must be done to the purpose of the organization for each invited guest under *Bolger v. Youngs Drugs Product Corp.*, 463 U.S. 60, 103 S. Ct. 28, 75-77 L. Ed. 2d 469 (1983)

[9]Note pending case of *AFS v. State U. of N. Y., Cortland*, 565 F. Supp. 754 (1983) presently pending in the Northern District of New York litigating similar issues where the university entered the student's dormitory room without warrant and arrested the AFS representative.

CONCLUSION

The Court of Appeals misconstrued the true focus and the issues of critical importance when it failed to recognize the students First Amendment rights within the privacy of their own home - their dormitory room. SASU and CAS respectfully urge that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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